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Nos. 85-1377, 85-1378 and 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL, *et al.*,
Appellants

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*

On Appeals from the United States District Court for the District of Columbia

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MEMORANDUM OF THE NATIONAL TREASURY EMPLOYEES UNION IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENTS

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QUESTIONS PRESENTED

Whether the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985 violates the separation of powers doctrine because:

1. It grants unelected administrative officials discretion to determine whether and to what extent spending levels for a broad range of legislative programs should be altered, without providing an intelligible principle to confine their discretion, and without permitting judicial review of their method of exercising that discretion; and

2. It requires the Comptroller General, an official who is removable by Congress, to make determinations that automatically trigger changes in spending levels authorized under enacted legislation.

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OPINION BELOW

The opinion of the district court is not yet reported. It is set forth in the Appendix to the Jurisdictional Statement filed by the appellant Charles G. Bowsher, Comptroller General, at 1a-52a.

JURISDICTION

The jurisdiction of the district court was based on section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, and the consolidated cases below were heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act, App. 116a. The district court entered its final order on February 7, 1986. App. 51a.

This Court has jurisdiction over these appeals under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, App. 116a-117a, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

INTRODUCTION AND STATEMENT

1. This case arose out of consolidated challenges to the automatic spending reduction mechanism of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, brought by the National Treasury Employees Union and a group of Congressmen. Under the Act, the economic forecasts made by certain administrative officials result in automatic reductions in, and elimination of, appropriated funds for a broad range of legislative enactments.

The goal of the Act is to reduce the size of the federal deficit to zero by fiscal year 1991. To do so, the Act establishes a maximum deficit amount for each fiscal year between 1986 and 1991. Section 201(a)(1), App. 57a. Under the Act, the Office of Management and the Budget (OMB) and the Congressional Budget Office (CBO) are to issue a report each year, on August 20th, that determines anticipated revenues and outlays for the coming year, forecasts economic conditions, and then predicts whether and by how much the projected deficit will exceed the target deficit for the year. Section 251 (a)(1), (a)(2), App. 81a-82a. If the projected deficit exceeds the target by over 10 billion dollars, then OMB and CBO must specify the spending cuts in existing programs that must be made, in accordance with the for-

mula Congress has established, in order to meet the target deficit amount. Section 251(a)(2), App. 82a. Within five days, the Comptroller General reviews the report and issues his own. Section 251(b), App. 86a. Thereafter, on September 1st, the President must issue a sequestration order, implementing the cuts specified by the Comptroller General. Section 252(a)(1), App. 90a.[1]

Thus, under the Act, the CBO, OMB, and Comptroller General have the authority to make economic estimates and projections that will trigger automatic spending cuts in existing legislation without further review by Congress or the President. Significantly, the economic data, assumptions, and methodology used by the Comptroller General to arrive at his determination of the projected deficit are not subject to judicial review. Section 274(h), App. 118a.

2. Plaintiff-appellee, the National Treasury Employees Union (NTEU), is a federal sector labor organization that represents the interests of both active and retired federal employees by acting as their representative in collective bargaining, by lobbying Congress for favorable working conditions and benefits, and by litigating their individual and collective rights in court. NTEU's 9,000 retiree members are amongst the very first persons who have been immediately and adversely affected by the au-

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[1] In general, the Act establishes that the first cuts are effectuated by eliminating all automatic cost of living adjustments mandated by statute. Thereafter, the Act would cut other items in the budget that are not otherwise exempted, by a uniform percentage, until the target deficit is met. The Act leaves it to the Comptroller General to predict what the deficit will be and thereby whether and in what degree cuts will be necessary.

For fiscal year 1986, the Act provides that the President's sequestration order shall be issued February 1, and effective March 1. Section 252(a)(1), (6)(A), App. 90a, 93a. It includes several other special provisions for 1986, including a limit on the maximum amount of the sequestration order. Section 251(a)(3)(A)(ii), App. 82a.

tomatic spending reduction mechanism contained in the Balanced Budget Act. In accordance with the Act, the cost of living adjustments due these individuals under the Civil Service Retirement Act were temporarily suspended on January 1, 1986. Section 252(a)(6)(C), App. 90a. Thereafter, the COLAs were permanently eliminated for 1986 by virtue of the Comptroller General's report and resulting Presidential sequestration order issued February 1, 1986, and effective March 1.

3. NTEU filed this suit on December 31, 1985, to challenge the constitutionality of the mechanism that suspended the COLAs due its retiree/members under the Retirement Act. NTEU's action was consolidated with a suit filed by Representative Mike Synar and a group of Congressmen. The Congressmen's right to maintain that suit had been assailed on standing grounds by the United States, the nominal defendant in the case. All parties agreed, however, (and the court held), that NTEU had standing to assert the rights of its undeniably injured retiree/members, in accordance with *Warth* v. *Seldin*, 422 U.S. 490 (1975). App. 9a-11a.[2]

In the district court, on the merits, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have conspired to abdicate their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority

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[2] The court ultimately rejected defendant and intervenors' arguments that the Congressional plaintiffs had suffered no injury in fact as a result of the Act. Applying the law of the D.C. Circuit, which "recognizes a personal interest by members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief," the district court ruled that the Congressional plaintiffs also have standing. App. 11a-13a.

to various unelected administrative officials, whose decisions and methods are explicitly insulated from judicial review. Secondly, plaintiffs contended (and defendant United States agreed), that to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a Congressional agency, or the Comptroller General, an official who is removable by the Congress.

4. The three-judge district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine. App. 1a-50a. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, the CBO and the Comptroller General to alter existing legislation, on the basis of determinations and methodologies that are not subject to judicial review, violates the constitutional provision that vests all legislative powers in Congress. After reviewing the recent history of the "delegation" doctrine, and comparing the Act to other legislation that has been upheld against a challenge of unconstitutional delegation, the court concluded that Congress' delegation of authority to the CBO, OMB, and Comptroller General contained sufficient standards to confine their discretion, and was therefore valid. App. 13a-28a.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles, a ground both plaintiffs and the United States had advanced. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature. Citing this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), the court concluded that the Comptroller General cannot exercise powers that are executive in nature, because he is removable by Congress, and because he lacks the necessary independence from Congress. App. 28a-50a. Giving such power over executive functions to Congress, the